IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

1) WRIT PETITION NO.2623/2005

Shri S.K.Gandhi & Ors. ..Petitioners
V/s.
The State of Maharashtra & ors. ..Respondents

Mr.Manoj Goyal, Sr. Counsel with Prakash Naik for the petitioners.

Mr.Amit Desai Sr.Advocate alongwith Shri Ashwin Ankhad i/by M/s.Ashwin Ankhad & Associates for Respondent No.2.

Mr.S.S.Pednekar APP for the State.

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2) WRIT PETITION NO.2626 OF 2005

Shri S.K.Gandhi & Ors. ..Petitioners
V/s.
The State of Maharashtra & Ors. ..Respondents

Mr.Manoj Goyal, Sr.Counsel with Prakash Naik for the petitioners.

Mr.Hemant Sethi i/by Shri V.K.Sharma & Shri Pradeep Lamba for Respondent no.2.

Shri S.S.Pednekar APP for the State.

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3) WRIT PETITION NO.2629 OF 2005

Shri S.K.Gandhi & Ors. ..Petitioners
V/s.
The State of Maharashtra & Ors. ..Respondents

Mr.Manoj Goyal, Sr. Counsel with Prakash Naik for the petitioners.

Mr.Manohar Ramsinghani alongwith D.M.Galani for respondent no.2.

Mrs.M.H.Mhatre APP for the State.

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4) WRIT PETITION NO.2630 OF 2005

Shri S.K.Gandhi & Ors. ..Petitioners
V/s.
The State of Maharashtra & ors. ..Respondents

Shri Manoj Goyal, Sr.Counsel with Prakash Naik for the petitioners.

Miss. Rekha Tawade i/by M/s.M.V.Kini & Co. for Respondent No.2.

Mrs.M.H.Mhatre, APP for the State.

Coram : R.S.Mohite,J

Date : 28.2.2006.

PC

1. Since in all these petitions, 2 common questions of law have been raised, they are all being disposed of by this common order. Before adverting to the 2 questions of law raised in all these petitions, the admitted position on facts is that a number of winding up petitions were filed against the accused company MOTOROL (I) Ltd.,. The first of these winding up petitions was presented on 22.12.1995 with other winding up petitions followed thereafter. After the presentation of the first winding up petition, the directors/officers of the company issued cheques in favour of various persons. Ultimately, by winding up order dated 19.8.1999 the accused company MOTOROL (I) Ltd., was ordered to be wound up.

2. The various creditors who had been issued the cheques, upon the dis-honour of the said cheques initiated proceedings under Section 138 of the Negotiable Instruments Act and the same are pending in the Court of the Metropolitan Magistrate, Esplanade, Mumbai.

3. The present petitions seek quashing of the said complaints on legal grounds which can be formulated as under :-

(a) That by virtue of section 441 (2) of the Companies Act the winding up of the company by the Tribunal shall be deemed to commence at the time of presentation of the petition for the winding up. Consequently this deeming fiction provided by section 441(2) of the Companies Act must be given full effect and all necessary consequences and corollaries of the deeming fiction must be deemed to be true and must be given effect fully. Reliance was placed on 4 judgments of the Apex Court viz. (1) Sudarshan Chits reported in (1984) 4 SCC 657 ; (2) Rishab Agro reported in (2000) 5 SCC 515 ; (3) Harish Taodon reported in (1995) 1 SCC 537 and (4) East End Dwellings reported in (1951) 2 All ER 587.

(b) That since the pre-eminence of the purpose behind the deeming fiction under section 441(2) is

also to ensure that there is no precedence given amongst its creditors, the company is forbidden from picking and choosing creditors for making payment.

(c) That in view of the deeming fiction, all dispositions of property made after the commencement of the winding up are void by the operation of section 536(2) of the Companies Act.

(d) In the circumstances, the cheques issued after the date of the presentation of the first petition amounted to a void disposition of property and therefore, the dis-honour of such cheques could not gave rise for offence under Section 138 of the Negotiable Instruments Act.

(e) That in any case in view of the Judgment of the Apex Court in the case of Sirmur Chemicals reported in 1962 (32) Company Cases 826, a consequence of the winding up order was with effect from the date of commencement of the winding up the directors were ousted from their post and ceased to have any authority from the deemed date of the winding up. This necessarily implied that the cheques issued by them were without authority of law and therefore, no offence under Section 138 of the Negotiable Instruments Act could be said to have been committed for the dis-honour of such cheques issued without authority.

4. In all the propositions canvassed by the petitioners I find no merits in law. The issues in question were dealt with by the Apex Court in the case of Pankaj Mehra, reported in AIR 2000 SC 1953. In the aforesaid case before the Apex Court, the question raised was whether the company could escape from penal liability under Section 138 of the Negotiable Instruments Act on the premise of a petition for winding up of the company has been presented and being pending when the cheque was issued. The division bench of the Bombay High Court, had held that company cannot avoid its liability on such a ground and the matter was carried to the Apex Court. Vide its judgment and order, the Apex Court after dealing with the provisions of Section 441(2) as well as section 536(2) of the Companies Act dismissed the petition by holding that the issuance of a cheque did not amount to disposition of property within the meaning of Section 536(2) of the Companies Act. That at the most the drawing of such a cheque could be considered to be a step towards disposition of the property but that by itself did not amount disposition of property. The Apex Court also negatived the contention that one of the conditions to constitute an offence under section 138 of Negotiable Instruments Act was that the cheque should have been drawn for a discharge of a legally

enforceable debt or liability and no such cheque would be possibly be conceived in a situation where a winding up proceeding had commenced, because the creditors would be debarred from legally enforcing the debt with the commencement of such winding up proceedings. This contention was dismissed by the Apex Court on the ground that the debt would not cease to be legally enforceable merely because somebody had filed a petition for winding up. Apart from this the Apex Court expressely held that even disposition of property made during the pendency of a winding up petition could not be said to be ab-initio void and the company could not contend that it was legally forbidden for making payment of the cheque amount when a notice was issued by the payee regarding dis-honour of the cheque. As regards the judgment of the Apex Court in Pankaj Mehra (supra) the argument advanced on behalf of the petitioners is the case was distinguishable on the ground that in the case before the Apex Court for winding up, the winding up order had not been passed. I fail to see how this can be a distinguishing factor. The Apex Court has expressly considered the provisions of section 441(2) which encompassed the deeming fiction as well as the provisions of section 536(2) which makes the disposition of property void subject to orders of the Court. It was sought to be contended that in any case the observation of the Apex Court relating

to issuance of cheque not amounting to " a disposition of property amounted to an "obitor dicta" since the issue did not arise in the case before the Apex Court and was thus not binding". I am of the view that the observation of the Apex Court cannot be said to be obitor. They are made upon careful consideration of the law and the very sections which was relied upon by the petitioners in the present case.

5. A faint attempt was made by the Advocate for the petitioners to contend that the observations of the Apex Court in Pankaj Mehra (supra) were per incurium as they malitiated against a view of the larger bench of the Apex Court in the case of Madan Mohan Pathak reported in 1978 (2) SCC 50 wherein it was held that the cheque itself was a property. But in all fairness to the Counsel appearing on behalf of the petitioners it was fairly conceded that the High Court could not hold that the judgment of the Apex Court was per incurium. The only request made that the submission could be noted that the issue could be raised in the Apex Court if needed.

6. In so far as the 2nd main contention relating to the cheques becoming un-authorised because of the directors ceasing to hold office from the date of the filing of the winding up petition, reliance was placed on the observation of the Apex Court to the

following effect :-

> " Under the provisions of Section 334(E) of the Companies Act 1956, the managing agent of the company shall be deemed to have vacated his office as such in all cases from the commencement of the winding up of the company".
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> . " That in any other case winding up of the company shall be deemed to commence at the time of the presentation of the petition from the winding up. In the case before me, petition for winding up was presented on 12th July 1999. Therefore, as from that date the managing agent shall be deemed to have vacated his office as the managing agent."

7. In my view, the Apex Court judgment was not dealing with a criminal offence and does not lay down that the criminal acts of an officer of the company committed after the presentation of the winding up would be un-authorised or that the said officer of the company would escape criminal liability in respect of any completed offence committed by him.

8. It may be mentioned that both parties have filed compilation of several judgments and I have perused the same. I do not find it necessary to deal with all of them as they either pertains to propositions of law which are acceptable or have no other direct bearing on the issue involved in the case.

9. It may also be mentioned that in all these petitions, earlier attempts were made to quash the prosecutions and points were taken peacemeal. In some of the matters attempt was made to quash the 138 proceedings on the footing that the winding up petitions had been presented. This challenge was negatived by this Court and while dismissing of such petitions by reasoned order, reliance was placed on the judgment in Pankaj Mehra’s case. Subsequently an attempt was made to quash the proceedings on the ground that there was no proper averments in the complaint. This Court dismissed those petitions with liberty to file a revision in the Sessions Court. The revisions have been dismissed by the Sessions Court in some of the cases but that order has not been challenged. In any case, the point of lack of averments has not been raised in this petition. It was sought to be argued that the principles of issue estoppel or resjudicata are foreign to criminal law. Be that as it may, peacemeal raising of points, in my view, would amount to abuse of the process of Court and this

Court should not be entertaining such successive subsequent petitions.

11. In the circumstances, all the petitions are dismissed. Certified copy expedited.

(R.S.Mohite,J)